STATE OF MICHIGAN

IN THE SUPREME COURT

FIRAS QARANA,

Plaintiff/Appellee,

Supreme Court Case No. 127488
Court of Appeals No. 244797
Oakland CC Case No. 00-022528-NI

v.

PARAGON INVESTMENT COMPANY, d/b/a THE ROYAL OAK MUSIC THEATER, JOHN DOE #1, JOHN DOE #2 and JOHN DOE #3,

Defendants,

and

NORTH POINTE INSURANCE COMPANY,

Garnishee-Defendant/Appellant.

_____/

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SUPPLEMENTAL BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

127488

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

COURT RULES

TREATISES

STATEMENT OF JURISDICTION

Pursuant to the Court's order of July 22, 2005, the Court sought additional argument regarding four issues which will be dealt with in turn.

QUESTIONS PRESENTED

1) WHETHER THE INSURER WAS REQUIRED TO USE "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY, "YES."

2) WHETHER A QUESTION OF FACT EXISTED REGARDING WHETHER GARNISHEE-DEFENDANT INSURER USED "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY, "YES."

3) WHETHER GARNISHEE-DEFENDANT INSURER MUST ESTABLISH THAT IT WAS PREJUDICED BY THE INSURED'S NON-COOPERATION?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY, "YES."

4) WHETHER A QUESTION OF FACT EXISTED REGARDING WHETHER GARNISHEE-DEFENDANT INSURER WAS PREJUDICED BY ITS INSURED'S NON-COOPERATION?

THE COURT OF APPEALS STATED, "YES."
APPELLEE ANSWERS, "NO."

ARGUMENT

1) WHETHER THE INSURER WAS REQUIRED TO USE "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY "YES."

There are two issues in this case which raise the question of "reasonable diligence." The first arises from the Court of Appeals opinion in this case which states on Page 3:

> An insurer's and insured's obligations under the cooperation clause of the liability policy are reciprocal. 22-138 Holmes' Appleman on Insurance Law and Practice (2d ed), 138.6 (B). The insured must cooperate with the insurer, and the insurer must use reasonable diligence in obtaining the insured's cooperation. Id. "It is the combination of steps allegedly taken by the insurer, and the strength of the proof that they were, in fact taken, which determines whether the efforts were diligent." 14 Couch on Insurance (3d ed), 199.22; see also Coburn, supra at 307 (noting that this Court did not address whether the insurer used due diligence in attempting to secure the insured's cooperation).(Citations in original).

Not to belabor a point raised throughout Appellee's original brief, but the efforts made by the insurer to secure the insured's cooperation were virtually nonexistent. The Appellant, Garnishee-Defendant North Pointe Insurance Company is the business of defending lawsuits. Its insured in this case, Defendant Paragon Investment Company, was not in the business of defending lawsuits. When it purchased a policy of insurance and received as a promise from the insurer to defend this litigation, Defendant Paragon expected that North Pointe Insurance Company would actually attempt to defend the action. The cause of the entry of the default judgment was Paragon's failure to answer the written interrogatories that eventually led to the motion to compel discovery and the eventual default judgment.

Plaintiff sent Defendant interrogatories on June 22, 2000, which was almost two months before Paragon filed its bankruptcy. All North Pointe did to answer these interrogatories was to send a letter on June 23, 2000, which is attached as Exhibit 7 to Appellee's original brief, asking Paragon's representative, Robert Fox, to answer the interrogatories on paper and to call the insurance company's attorney if he had any questions. Simply sending a letter to a client is not reasonable diligence in securing cooperation from the insured.

This leads into the other issue of "reasonable diligence" raised in Appellee's original brief to this Court, Michael Ewing's failure to comply with the Michigan Rules of Professional Conduct regarding diligence. As stated in the original brief, "A lawyer shall act with reasonable diligence and promptness in representing a client." MPRC 1.3. The comment section for the rule warns of the problem of lawyer procrastination. Paragon Investment Company paid for its insurance contract and was supposed to receive appropriate legal representation. By simply sending the interrogatories to its client and not following up, or making an appointment, or setting up a meeting to go through the answers, or to do any other internal discovery of the insured, the insurer and its counsel simply dropped the ball.

Insurance companies understand that for the most part the purpose of defending a lawsuit is to protect the insurance company from having to pay claims. It is the insurance companies' money they are seeking to protect. Sending the interrogatories to the insured and hoping that the insured would answer the interrogatories is hardly using reasonable diligence to secure cooperation of anything. The insurance company had the incentive to make sure that it was able to defend this action so as to eliminate or limit its own financial exposure. Presumably, Paragon Insurance Company was only obligated as far as its deductible. Not knowing what that deductible

was, the potential liability was likely far greater for the insurance company than it ever would have been for Paragon. But the insurer did not make any effort whatsoever to secure this information during the time of discovery and, if it is possible, it made even less of an attempt once Paragon filed bankruptcy. Appellant cannot now hide behind all of these failures and attempt to point the finger at the insured by saying, "They failed to cooperate with us." Clearly, the insurance company failed to cooperate with its own insured. Similarly, the insurance company's attorney, Michael Ewing, who was employed by the insurance company, failed his ethical obligations pursuant to the Michigan Rules of Professional Conduct by not using reasonable diligence to defend this action.

2) WHETHER A QUESTION OF FACT EXISTED REGARDING WHETHER GARNISHEE- DEFENDANT INSURER USED "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY, "YES."

As far as Appellee is concerned, it is clear that as a matter of law, that the insurance company did nothing to use reasonable diligence to secure the cooperation of the insured. However, the trial court denied Appellee's motion for summary disposition on this issue and the Court of Appeals was unwilling to grant it as well. As Appellee did not appeal that decision, Appellee's motion for summary disposition is not before this Court. Thus, Appellee is prepared to demonstrate by factual testimony that the insurer failed to use reasonable diligence in securing the cooperation of the insured.

Appellant relies on the case of Hastings Mutual Insurance Co. v. Auto-Owners Insurance Co., Michigan Court of Appeals Case No. 232947 (September 17, 2002) (unpublished) which is

discussed at length in both the previous briefs. As evidenced by the attempt made by the insurance company and its attorney in that case, which was the first case to demonstrate a real effort by an insurance company to establish that it was prejudiced as a result of its insured's noncooperation, there is a question of fact as to whether Appellant in this case came anywhere close to the level of effort made in Hastings. Appellee is prepared to call the defense attorney in Hastings to testify at trial as to what he did to diligently pursue the insured in his case. As stated in the original brief, that included writing five certified letters, hiring a private investigator to attempt to secure an appearance at a deposition on three different occasions and giving significant warnings of the insurance company's intention to withdraw coverage from the action during nine months of defense.

In the instant case, the insurance company did virtually nothing until the point at which the trial court granted Plaintiff's Motion to Compel Discovery. At that point, the insurance company and its attorney jumped into action and over the next 28 days, did more work on this file than they had done during the whole prior existence of this case and then, the attorney withdrew from the action. But all of this work was too little and too late and it was focused in the wrong direction. Ewing was trying to contact the bankrupt insured five months after it had filed bankruptcy. In 28 days, Michael Ewing wrote five letters and made one telephone call in order to seek some type of assistance either from the bankruptcy trustee or from the attorney from the now-bankrupt insured. The trustee in bankruptcy was simply there to marshall assets and did not have any ability to assist the insurance company and the attorney was no longer the attorney as the business was in bankruptcy. The insurance company simply dropped the ball again.

Thus, there is a question of fact as to whether the Defendant used reasonable diligence in

securing the cooperation of the insured. The facts will bear out that they did not use reasonable diligence but the trial court should have the opportunity to hear the testimony and the evidence of what was done, and what should have been done, in order to make a determination that the insurance company failed in its obligations.

3) WHETHER GARNISHEE-DEFENDANT INSURER MUST ESTABLISH THAT IT WAS PREJUDICED BY THE INSURED'S NON-COOPERATION?

THE COURT OF APPEALS AND APPELLEE STATE AFFIRMATIVELY, "YES."

This question is the subject of the entire previous brief, and pursuant to the Court's request that the parties not re-state prior arguments, Appellee will simply state that for more than 50 years, it has been the law of this State that an insurance company must establish that it was prejudiced by its insured's noncooperation. The reasons for this have been set forth repeatedly in Appellee's brief as well as the Court of Appeals' opinion and the previous rulings of this Court. Another case, however, that was not mentioned in the previous brief was Bernadich v. Bernadich, 287 Mich. 137, 283 N.W. 5. (1938).

The Bernadich case was decided 20 years before Allen v. Cheatham, 351 Mich. 585, 88 N.W. 2d 306 (1958). In Bernadich there was an allegation that the defendant insured told the insurance company on three different occasions that the automobile accident at issue in the case was caused by an unknown additional vehicle which ventured into traffic. Prior to the trial, the defendant insured recanted and stated there was no other vehicle. The insurance company alleged that the insured committed fraud and refused to defend. The plaintiff won at trial. In the subsequent garnishment action, the trial court found that the insurance company was liable and

this Court agreed.

The Court discussed the issue of noncooperation and prejudice. The Court held that there was no prejudice to the insurance company because of the defendant's conduct. "It is urged that the insurance company was prejudiced in not being able to investigate the accident and had not sufficient opportunity to make settlement rather than go to trial. The company had two weeks from the time of learning of Defendant's final version of the accident until the time of trial. No attempt was made to secure a continuance by the attorneys before the company proceeded to the trial of the principal case." Bernadich, at 146. This Court determined that the insurance company was not prejudiced because it had time to investigate the accident further, chose not to, and let the trial proceed with two weeks' notice of its insured's change of his story.

In Qarana, the insurance company attorney had nine months to investigate this claim. It received interrogatories answered by the Plaintiff. It never took the Plaintiff's deposition. It never investigated its own insured's records. It never assisted in the answering of the Plaintiff's interrogatories to Defendant. It never even met with the insured!

Of course, Garnishee-Defendant must establish that it was prejudiced and that prejudice, as stated in the previous brief, is not that it would have saved money or lost money based on the court's determination. Thus, since at least 1938, this Court has determined that an insurance company has the obligation to establish prejudice. In this case it has failed to do so.

4) **WHETHER A QUESTION OF FACT EXISTED REGARDING WHETHER GARNISHEE-DEFENDANT INSURER WAS PREJUDICED BY ITS INSURED'S NON-COOPERATION?**

THE COURT OF APPEALS STATED, "YES."
APPELLEE ANSWERS, "NO."

Obviously Appellee truly believes there is no question of fact as to whether Defendant was prejudiced by the insured's noncooperation, as there was no prejudice. First, there was no noncooperation, but if there is an allegation of noncooperation, the burden of proof is on the insurance company to establish that it was prejudiced. All the insurance company can say is that it wrote a couple of letters and made a couple of telephone calls and "expected" the insured to "cooperate." The insurance company must have expected the insured to defend itself in this proceeding because by the lack of effort made by the insurance company and its attorney, there was no direction, there was no assistance, there was no leadership, there was simply nothing that the insurance company did to defend this action.

But in the manner in which the question is framed, however, it would be expected that since the insurance company has the burden, it would have to prove how it was prejudiced by this alleged noncooperation. So far, the facts do not show any prejudice at all. But clearly, there is a question of fact in this issue for the insurer to demonstrate.

Thus, Appellee urges this Honorable Court to deny leave to appeal, to permit the opinion of the Court of Appeals to stand so that there can be an actual trial as to the issues in this case. Since Plaintiff's Motion for Summary Disposition was denied and Defendant's Motion for Summary Disposition was reversed, the matter is appropriately before the trial court so that the Court can hear the evidence, weigh the testimony of the participants in this action, hear firsthand what little the insurance company did to defend this action and to hear from other attorneys what an appropriate defense would have been, as it was in Hastings and in other cases defended on a daily basis in this state.

This Court should not involve itself in this case at this point. There is not enough factual

determination, there has not been a hearing on the merits. It would be premature for this Court to rule in this case at this time.

WHEREFORE, Appellee respectfully requests that this Court deny Appellant's Application for Leave to Appeal.

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